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November 27, 2019

VIA ECF

Honorable James Donato
United States District Court
Northern District of California
450 Golden Gate Avenue, 19th Floor
San Francisco, CA 94102

Re: *In re PG&E Corp. and Pac. Gas & Elec. Co.*, Case No. 19-cv-05257-JD (N.D. Cal.)

Dear Judge Donato:

Pursuant to paragraph 18 of the *Standing Order for Discovery in Civil Cases* before this Court, we write on behalf of the Ad Hoc Subrogation Group and TCC (together, the “Wild Fire Claimants”) to alert the Court to a dispute regarding the production of evidence in the possession of the California Department of Forestry and Fire Protection (“Cal Fire”). The parties met and conferred on November 8, 13 and 25, 2019, regarding the subpoenas, excerpted at Exhibit A, and Cal Fire’s objections at Exhibit B. The Wild Fire Claimants seek three categories of evidence regarding the largest and most devastating fire at issue in these proceedings—the 2018 Camp Fire:

- (1) The Cal Fire report analyzing the cause of the Camp Fire;
- (2) Any physical evidence (including photographs) in Cal Fire’s possession regarding the Camp Fire; and
- (3) Depositions of the two most knowledgeable Cal Fire employees concerning their investigation into the Camp Fire.

Cal Fire has objected on the grounds that there is an ongoing criminal investigation of PG&E by the Butte County District Attorney’s office, and that the discovery sought is protected by a “law enforcement privilege.” Such a “law enforcement privilege,” to the extent it is recognized at all in the Ninth Circuit, is qualified and can be overcome by a showing that the Wild Fire Claimants’ need for this information outweighs any public interest in non-disclosure.

That test is clearly met here. Roughly 75% of all damages at issue in this estimation proceeding (when the Tubbs fire is excluded) stem from the Camp Fire. We understand that most of the physical evidence from the origin point of the Camp Fire has been transferred by the Butte County District Attorney to the FBI for testing in connection with its criminal investigation of PG&E. Any relevant evidence not in possession of the government sat in the hands of PG&E alone for almost nine months before it started slowly producing evidence to the Wild Fire Claimants, by which time PG&E and its 27 experts had already prepared reports for this estimation proceeding. The Cal Fire evidence

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being sought will help level the playing field by giving the Wild Fire Claimants access to the work of state fire investigators who have been investigating the Camp Fire since November 2018—evidence that would have already been made public were PG&E not under criminal investigation in connection with the fire. (PG&E has declined to support this application for information from Cal Fire.) It would be nothing short of tragic if the Camp Fire victims, who have already lost so much, were unable to recover in these proceedings because the evidence needed to prove their case was shielded by state agencies assisting criminal investigations. Granting this motion to compel will remedy that potential injustice. In the absence of the physical evidence itself, the Cal Fire report and testimony of Cal Fire investigators who authored that report will provide this Court and the parties with an extremely valuable data point of PG&E's likely liability, and its production accordingly is warranted here.

Background

The Camp Fire unfortunately requires little introduction. Early in the morning of November 8, 2018, the fire started in Pulga, California, and spread with devastating speed to the surrounding communities. Eighty-five people lost their lives, many more were injured, and thousands lost their homes or businesses. In addition, more than 153,335 acres burned, and tens of thousands of homes and other structures were destroyed, including nearly the entire town of Paradise, which was leveled and remains largely uninhabitable today.

PG&E admits that its equipment started the Camp Fire. PG&E has identified the origin point of the Camp Fire as a nearly 100-year-old transmission tower (Tower :27/222). It is undisputed that the Camp Fire started after a "C-Hook"—which supported a series of insulators—broke, permitting a live wire to hit the steel Tower :27/222, sparking a fire below. This failed C-Hook appears to have been an antiquated piece of hardware (itself perhaps 100 years old) that was severely worn. PG&E apparently did not identify this C-Hook for replacement, or others it has since removed from towers on the same Transmission line, despite the C-Hook's advanced age and the obvious danger it posed.

Despite these facts, PG&E is going to argue to this Court that it is not, in their words, "legally liable" for any damages. PG&E has yet to explain how the definition of "legally liable" excludes a utility company that inadequately maintains equipment installed during the Woodrow Wilson administration. PG&E used the bankruptcy automatic stay as the basis to deny producing the Wild Fire Claimants any documents until August 2019, only *after* the Bankruptcy Court agreed to permit estimation and withdrew the reference to this Court, and even then only produced documents they selected and has been slow to produce the documents requested by the Wild Fire Claimants. At the same time, apparently much of the relevant physical evidence has been transferred to FBI testing facilities in Quantico, Virginia.

The limited physical evidence that the Wild Fire Claimants have been able to examine demonstrates PG&E's culpability. For example, the two photographs below show C-Hooks that PG&E allowed to disintegrate until eventually disaster struck. The photograph on the left, taken from a similar PG&E tower as one where the Camp Fire ignited, shows what happens when a metal C-Hook rubs against the steel plate it has sat in for decades. The original smooth C-Hook shape is eroded, leaving a gouge where the C-Hook and steel plate made contact. The photo on the right is the broken C-Hook that started the Camp Fire. The Wild Fire Claimants believe the evidence will show a similar slow erosion resulted in the Camp Fire C-Hook snapping in half. PGE-CAMP-CPUC-0000010585.

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But the Wildfire Claimants have not been able to access all of the evidence from Tower :27/222 and have not been given any access to the physical evidence from that tower, including the hook depicted in the photograph above. Thus, they seek the production of any physical evidence in the possession of Cal Fire, or any testing or recordings (such as photos) of that evidence. Perhaps even more critically, the movants seek the investigative report of Cal Fire and the testimony of those employees who oversaw that investigation. Given the expedited nature of these proceedings, and the unavailability of critical evidence in the possession of the FBI, the Cal Fire report and depositions at least would allow this Court to be presented with the conclusions of the only experts who have had an opportunity to thoroughly examine the relevant physical evidence from the Camp Fire.

Cal Fire has no legal basis to withhold the evidence sought. “Neither the Ninth Circuit nor the Supreme Court have recognized a law enforcement privilege.” *United States v. Rodriguez-Landa*, 2019 WL 653853, at *16 (C.D. Cal. Feb. 13, 2019); (citing *Shah v. Department of Justice*, 714 Fed.Appx. 657, 658-69 (9th Cir. 2017)); see also *Doe 1 v. McAlleenan*, No. 18-cv-02349, 2019 WL 4235344, at *3 (N.D. Cal. Sept. 6, 2019). Even if the law enforcement privilege were recognized, it would not apply here. “The privilege is qualified, not absolute, and must give way when the needs of a particular litigant for access to information outweigh the public interest in non-disclosure.” *Doe 1*, WL 4235344 at *2 (N.D. Cal. Sept. 6, 2019). Cal Fire “bears the burden of showing that the privilege applies,” and “a claim of law enforcement privilege must be supported by the declaration of an appropriate agency official who has personally considered the materials at issue.” *Id.* at 2. Here, Cal Fire has not provided a declaration; its letter of November 15, 2019, at Exhibit B, does not identify any justification for why the law enforcement privilege should apply; and the factors that courts consider when assessing whether a litigant’s need for information outweighs the public’s interest in non-disclosure do not weigh in Cal Fire’s favor. *Doe 1*, WL 4235344 at *3 (N.D. Cal. Sept. 6, 2019) (factors include “the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information,” “the impact upon persons who have given information of having their identities disclosed,” and “the importance of the information sought to the plaintiff’s case.”). The information sought by the Wild Fire Claimants is central to their case, it is not available from other sources, and Cal Fire has not articulated any countervailing considerations, let alone ones that would outweigh the Wild Fire Claimants need for this crucial evidence in these proceedings.

The Honorable James Donato.
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Sincerely,

Benjamin P. McCallen

Counsel for the Ad Hoc Subrogation Group

Jointly submitted with:

Kimberly S. Morris

*Counsel for the Official Committee
of Tort Claimants*

UNITED STATES BANKRUPTCY COURT

Northern

District of

California

In re PG&E CORPORATION

Debtor

(Complete if issued in an adversary proceeding)

Case No. 19-30088

Chapter 11

Plaintiff

v.

Adv. Proc. No.

Defendant

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: California Department of Forestry and Fire Protection

(Name of person to whom the subpoena is directed)

☒ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: The complete unredacted 2018 Camp Fire Investigation Report including all unredacted attachments.

PLACE	DATE AND TIME
Singleton Law Firm, 450 A St., 5th Floor, San Diego, CA 92101	10/03/19 10:00 am

☐ **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

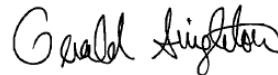
PLACE	DATE AND TIME

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/03/19

CLERK OF COURT

OR



Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, email address, and telephone number of the attorney representing (name of party) Claimants, who issues or requests this subpoena, are:

Gerald Singleton, 450 A St., 5th Floor, San Diego, CA 92101, gerald@SLFfirm.com, (619) 771-3473

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

UNITED STATES BANKRUPTCY COURT

Northern

District of

California

In re PG&E CORPORATION

Debtor

(Complete if issued in an adversary proceeding)

Case No. 19-30088

Chapter 11

Plaintiff

v.

Adv. Proc. No.

Defendant

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: California Department of Forestry and Fire Protection

(Name of person to whom the subpoena is directed)

☐ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

PLACE

DATE AND TIME

☒ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Permit an inspection of the evidence collected and retained by Cal
Fire regarding the ignition source of the Camp Fire.

DATE AND TIME

TBD

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/24/19

CLERK OF COURT

OR



Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, email address, and telephone number of the attorney representing (name of party)
Claimants, who issues or requests this subpoena, are:

Gerald Singleton, 450 A St., 5th Floor, San Diego, CA 92101, gerald@SLFfirm.com, (619) 771-3473

Notice to the person who issues or requests this subpoena

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*Attorneys for California Department of
 Forestry and Fire Protection*

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION,

- and -

PACIFIC GAS AND ELECTRIC COMPANY,

Debtors.

- ☐ Affects PG&E Corporation
- ☐ Affects Pacific Gas and Electric Company
- ☐ Affects both Debtors

**All papers shall be filed in the Lead Case, No. 19-30088 (DM)*

Bankruptcy Case
 No. 19 30088 (DM)

Chapter 11

(Lead Case)

(Jointly Administered)

**California Department of Forestry
 and Fire Protection's (CAL FIRE)
 Objections to Subpoena**

Pursuant to Federal Rule of Bankruptcy Procedure 9016, incorporating Federal Rule of Civil Procedure 45, California Department of Forestry and Fire Protection (CAL FIRE) submits the following objections to the Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding) to California Department of Forestry and Fire Protection, served by Gerald Singleton on behalf of individual claimants (Subpoena).

The Subpoena demands production of “The complete unredacted 2018 Camp Fire Investigation Report including all unredacted attachments” by October 3, 2019.

CAL FIRE objects to the extent that this Subpoena seeks information protected by attorney-client, work product, or official information privileges, or information or documents protected by constitutional or statutory privacy protections. CAL FIRE objects that this Subpoena seeks documents that may be evidence in ongoing criminal investigations, and in doing so, may interfere with such investigation.

CAL FIRE objects that this Subpoena is cumulative and duplicative of the Subpoena issued by the Official Committee of Tort Claimants in August 2019. CAL FIRE further objects that this Subpoena was issued and served without coordination with CAL FIRE or other parties seeking similar discovery from CAL FIRE, such as the Official Committee of Tort Claimants, contrary to the prior direction of the Court.

Subject to the foregoing, and without waiving its objections, CAL FIRE will not produce privileged or protected information and cannot release responsive information from its files at this time due to the ongoing criminal investigation.

Dated: September 16, 2019

By: /s/ Paul J. Pascuzzi

STEVEN H. FELDERSTEIN
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WILLOUGHBY PASCUZZI & RIOS LLP
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November 15, 2019

Via electronic mail to: kmorris@bakerlaw.com

Kim Morris
Baker Hostetler
1160 Battery Street East | Suite 100
San Francisco, CA 94111

RE: In re PG&E Bankruptcy, N.D. Cal. Bankr. Case No. 19-30088-DM

Dear Kim:

As we discussed over the phone, and consistent with CAL FIRE's prior representations and objections to subpoenas served by other parties to the bankruptcy matter, during the pendency of a criminal investigation, CAL FIRE does not have the authority to release evidence and/or reports that are part of the investigation being conducted by the local district attorney exercising his law enforcement authority. As we also noted on the phone, whether the Butte County District Attorney is willing to allow an exception to this general rule for the TCC's informal requests is not a decision that CAL FIRE can unilaterally make during the pendency of a criminal investigation.

Accordingly, in light of the ongoing criminal investigation into the November 8, 2018, Camp Fire (Camp Fire) by the Butte County District Attorney, CAL FIRE is not in a position at this time to (1) release/produce a copy of the investigation report into the origin and cause of the Camp Fire; (2) release/produce copies of photographs taken by CAL FIRE personnel during the course of that investigation; or (3) permit inspection of any physical evidence relating to the origin and cause of the Camp Fire that is currently in CAL FIRE's custody.

Please feel free to contact me should you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Welchans", is written over a horizontal line.

KELLY A. WELCHANS
Deputy Attorney General

For XAVIER BECERRA
Attorney General